

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

ROBERT HAMPTON,	)	
	)	No. CV 08-538-HU
Plaintiff,	)	
	)	
v.	)	
	)	FINDINGS AND
MICHAEL J. ASTRUE,	)	RECOMMENDATION
Commissioner, Social	)	
Security Administration,	)	
	)	
Defendant.	)	
_____	)	

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HUBEL, Magistrate Judge:

Robert Hampton brings this action pursuant to Section 205(g) of the Social Security Act (the Act), 42 U.S.C. § 405(g), to obtain judicial review of a final decision of the Commissioner of the Social Security Administration (Commissioner) denying his application for Supplemental Security Income benefits under Title XVI of the Social Security Act.

### **Procedural Background**

Mr. Hampton filed an application for benefits on February 6, 2003 with an alleged onset date of January 1998. The application was denied initially and upon reconsideration. Mr. Hampton requested a hearing, which was held on September 1, 2005 before Administrative Law Judge (ALJ) William Stewart Jr. On November 9, 2005, the ALJ issued a decision finding Mr. Hampton not disabled. Mr. Hampton requested Appeals Council review, which was denied. Mr. Hampton appealed to the United States District Court, and by order dated July 27, 2006, the Commissioner's decision was reversed and remanded for further proceedings. After a second hearing on November 20, 2007, ALJ Stewart issued another decision, on February 15, 2008, finding Mr. Hampton not disabled.

Mr. Hampton was born in 1958, and was 49 years old at the time of the ALJ's second decision. He alleges disability based on a combination of impairments, including Crohn's disease, inflammatory bowel disease, depression, anxiety, and back pain. He has a high  
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1 school education and two years of college. He has no past relevant  
2 work experience.

### 3 **Medical Evidence**

4 The medical evidence in the record does not indicate when Mr.  
5 Hampton was diagnosed with Crohn's disease. The earliest records  
6 from a gastroenterologist are chart notes from Lane  
7 Gastroenterology Associates, indicating that Mr. Hampton was sent  
8 several reminders about lab work and office visits in June and July  
9 2001, but did not respond until May 3, 2002, when he called to  
10 request a refill for Imuran. Tr. 133. A chart note dated May 21,  
11 2002, written by Mr. Hampton's primary care physician, Gary Brandt,  
12 M.D., indicates that he refilled Mr. Brandt's prescription for  
13 Imuran, with advice that further refills should come from his new  
14 gastroenterologist. Tr. 124.

15 On June 5, 2002, Nathan Markowitz, M.D., a gastroenterologist  
16 at Lane Gastroenterology Associates, wrote that Mr. Hampton was  
17 "currently living at home with his father as he has recently lost  
18 his current employment in an insurance agency."<sup>1</sup> Tr. 131. Mr.  
19 Hampton reported that he was a smoker. Id. Dr. Markowitz wrote that  
20 Mr. Hampton had Crohn's disease, "under good control on Imuran but  
21 noncompliance for followup on labs. He did miss a month of Imuran."  
22 Id. Dr. Markowitz ordered laboratory studies and emphasized that  
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25 <sup>1</sup>Although Mr. Hampton's Social Security records indicate  
26 that after 1991, Mr. Hampton had no reported earnings except for  
27 \$703.13 in 2001, tr. 62-64, 76-77, Mr. Hampton reported that he  
had worked for Progress Insurance in 2003 doing data entry. Tr.  
119.

1 these need to be followed up on or we will not refill his  
2 medicines. He is given one year refill of Imuran at the  
present time. He should be seen back on a yearly basis  
for his Crohn's disease.

3 Id.

4 In a chart note dated June 5, 2002, Dr. Markowitz wrote that  
5 Mr. Hampton had been on Imuran for Crohn's disease, but

6 [u]nfortunately, the patient did not follow up and there  
7 are several reports in the office of trying to reach him.  
8 He tells me that he has moved several times. ... He  
called about an Imuran refill and wound up getting that  
9 from Dr. Brandt, as we have no record of him following up  
on any laboratory studies. He states that he has done  
10 none. The last are from March of 2001. He has actually  
felt that he has been in pretty good health overall  
otherwise.

11 Tr. 133.

12 On November 13, 2002, Dr. Markowitz gave Mr. Hampton a note  
13 stating, "Patient disabled by inflammatory bowel disease." Tr. 132.

14 On January 3 and January 9, 2003, Mr. Hampton was seen by John  
15 Brandon, a physician's assistant in Dr. Brandt's office, for upper  
16 respiratory infection and dry cough. Tr. 121, 123. He was still  
17 smoking half a pack of cigarettes a day. He had stopped taking his  
18 Imuran. Tr. 123. An x-ray taken January 9, 2003, showed no signs of  
19 infiltrate consolidation or abnormality. Tr. 121, 122.

20 On July 16, 2003, Dr. Markowitz wrote a letter to Mr. Hampton  
21 saying his office had been unable to reach him for the laboratory  
22 studies, required of patients taking Imuran. Tr. 159. Dr. Markowitz  
23 stated that if he did not hear from Mr. Hampton in one week, he  
24 would stop refilling his prescriptions and discontinue care.  
25 According to Dr. Markowitz, "This is a very toxic drug that  
26

1 requires monitoring at least every three months, and the last  
2 record I have is from February of 2003." Id.

3 On September 23, 2003, Dr. Markowitz reviewed a colonoscopy  
4 and had "a very extended discussion" with Mr. Hampton about  
5 therapy. Tr. 143. Dr. Markowitz wrote,

6 While he has been on Imuran he hasn't really taken it.  
7 When I asked him, he wasn't taking Imuran because he felt  
8 that he was getting nauseated ... He also has missed a  
9 lot of work and has had problems working because he has  
10 been late because of diarrhea and too embarrassed to talk  
11 about it.<sup>2</sup> ... The long and the short of our extensive  
12 discussion is that he has agreed to take Imuran regularly  
13 ... . I emphasized ... that he needs to be compliant on  
his blood work and compliant on taking the medicine if we  
are to find out whether or not it actually works. I am  
concerned because he has had recurrent symptoms of  
diarrhea but he hasn't really given a good shot at  
therapy. ... I think clearly we have a major  
noncompliance issue here which is making a big  
difference, of course, in terms of his outcome.

14 Id.

15 Dr. Markowitz also encouraged Mr. Hampton to "continue to seek  
16 work and [be] aware that he can be supported in terms of possible  
17 side effects from his inflammatory bowel disease that may limit him  
18 initially." Tr. 142.

19 Mr. Hampton saw Dr. Markowitz again on February 3, 2004. Tr.  
20 158. Dr. Markowitz thought Mr. Hampton had "pretty good control of  
21 symptoms" of his Crohn's colitis with Imuran. Id. He told Mr.  
22 Hampton to continue with the Imuran and obtain a chemistry panel  
23 every three months. Id.

24 On August 13, 2004, Dr. Markowitz wrote that Mr. Hampton was  
25 "actually doing pretty well from an inflammatory bowel standpoint,"

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26  
27 <sup>2</sup> See footnote 1 above.

1 writing that his weight had dropped from 216 to 210, due to  
2 intentional weight loss from dieting. Tr. 141. He had no GI  
3 symptoms. Id. Mr. Hampton complained of an upper respiratory  
4 infection, for which he was encouraged to see Dr. Brandt. Id. Dr.  
5 Markowitz wrote, "He knows he needs to be on chronic labs every  
6 three months. ... He will come back if symptoms develop." Id. Mr.  
7 Hampton did not return to Dr. Markowitz until September 2005.

8 On September 25, 2004, Mr. Hampton saw Dieta Ruschensky, M.D.,  
9 in Dr. Brandt's office, for complaints of a cough with some  
10 wheezing. Tr. 156. Mr. Hampton reported that he was taking Imuran  
11 and folic acid for Crohn's disease, but "otherwise feels quite  
12 well." Id. Dr. Ruschensky diagnosed bronchitis and prescribed an  
13 inhaler. Id. She recommended that he stop smoking. Id.

14 On February 17, 2005, Mr. Hampton saw a nurse practitioner at  
15 Dr. Brandt's office, complaining of cough, wheezing and shortness  
16 of breath and episodes of dizziness and weakness. Tr. 155. Mr.  
17 Hampton denied a history of asthma, but acknowledged that he  
18 smoked. Id. He was diagnosed with upper respiratory infection and  
19 prescribed cough syrup and inhalers. Id. A chest x-ray taken on  
20 February 18, 2005, was normal. Tr. 366.

21 Mr. Hampton saw Dr. Brandt on May 25, 2005. Tr. 361. Dr.  
22 Brandt wrote that Mr. Hampton complained of fatigue with  
23 significant depressive symptoms, as well as flares of diarrhea  
24 triggered by nerves. Tr. 361. He was started on Lexapro. Id.

25 On August 17, 2005, Dr. Brandt noted that Mr. Hampton was  
26 unable to tolerate Lexapro because of GI symptoms. Tr. 358. Dr.

1 Brandt started him on a trial of Effexor. Id. Dr. Brandt wrote that  
2 Mr. Hampton had "[d]isability issues surrounding student loans,"  
3 and wished Dr. Brandt to "communicate with his student loan carrier  
4 regarding his condition in hopes of having his loan waived." Id.  
5 Dr. Brandt was willing to do so if Mr. Hampton provided forms. Id.

6 Chart notes from Lane Gastroenterology dated May 6, 2005, to  
7 August 26, 2005, show six unsuccessful attempts to contact Mr.  
8 Hampton to remind him of necessary lab work. Mr. Hampton was  
9 eventually seen by Dr. Markowitz on September 9, 2005. Tr. 351. Dr.  
10 Markowitz wrote that Mr. Hampton was "intermittently compliant,"  
11 taking the Imuran, but only taking three a day, although "[a]ll of  
12 our records indicate that he was told to increase to four a day."  
13 Id. Dr. Markowitz wrote that Mr. Hampton had some increased  
14 diarrhea, but no bleeding and no weight loss--in fact, a weight  
15 increase to 221 pounds. His last colonoscopy showed patchy colitis.  
16 Id. Interval medical history was otherwise negative. Id. Dr.  
17 Markowitz wrote that Mr. Hampton reported no remarkable symptoms  
18 except for fatigue, GI symptoms, anxiety and depression. Id. Dr.  
19 Markowitz concluded, "Crohn's disease, possibly with worsening  
20 symptoms. He is hard to read. Compliance and depression remain an  
21 issue." Id.

22 Chart notes dated October 28, 2005, to January 3, 2006, show  
23 repeated unsuccessful efforts by Lane Gastroenterology to contact  
24 Mr. Hampton, by phone and letter, to remind him of lab workups in  
25 order to continue Imuran. Tr. 348.

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1 On January 20, 2006, Mr. Hampton told Dr. Brandt he wanted  
2 another GI provider, "having had a falling out with his previous  
3 care provider, apparently over interpretation of instructions and  
4 followup." Tr. 355. He was referred to Harry Park, M.D. Id. Dr.  
5 Brandt wrote that he had been asked to complete a medical source  
6 statement by Mr. Hampton's attorney, and had noted that his  
7 limitations were predominantly on the basis of joint pain,<sup>3</sup>  
8 hayfever, and Crohn's disease. Id.

9 On February 9, 2006, Mr. Hampton saw Dr. Park. Tr. 369. Dr.  
10 Park wrote that Mr. Hampton did not have any significant abdominal  
11 pain, nausea or vomiting, although he had about six to seven loose  
12 stools daily. Id. Mr. Hampton had not seen bright red blood in his  
13 stool. Id. Mr. Hampton stated that the loose stools appeared to be  
14 related to stress or anxiety. Id. Dr. Park noted that Mr. Hampton  
15 was currently smoking a half pack of cigarettes per day, although  
16 he denied chest pain or shortness of breath. Id.

17 Dr. Park wrote that in spite of the issue with the doctors at  
18 Lane Gastroenterology over compliance with medications, Mr. Hampton  
19 was "still persistently on 150 mg." of Imuran, despite being told  
20 to take 200 mg. Tr. 370. Dr. Park scheduled him for a colonoscopy  
21 and, after that, an upper GI series. Id. Mr. Hampton was advised to  
22 stop smoking, "as tobacco will make his Crohn's disease worse." Id.

23 An endoscopy done on March 30, 2006, showed mild Crohn's  
24 colitis and simple internal hemorrhoids. Tr. 468.

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26 <sup>3</sup> The medical record before the court does not contain any  
27 other information about joint pain as of this date, i.e., nothing  
regarding which joints, and what problems or limitations.



1 On May 2, 2006, Mr. Hampton saw Arneyo Perez, M.D., for  
2 complaints of cough, shortness of breath, and a lump in the left  
3 inguinal region when he coughed, accompanied by occasional  
4 abdominal pain. Tr. 465. Dr. Perez diagnosed a left inguinal hernia  
5 and referred Mr. Hampton to the surgical department. Id. He also  
6 diagnosed seasonal asthma and started him on an inhaler. Id.

7 On May 11, 2006, Dorothy Anderson, Ph.D., completed a rating  
8 of mental limitations for Mr. Hampton, based on a records review.  
9 Tr. 372. In her opinion, Mr. Hampton suffered from depressive  
10 syndrome characterized by anhedonia and decreased energy. Tr. 375.  
11 She found no limitations in the areas of 1) activities of daily  
12 living; 2) maintaining social functioning; and 3) maintaining  
13 concentration, persistence, or pace. Id.

14 On May 15, 2006, Mr. Hampton was admitted to Sacred Heart  
15 Medical Center for 10 days, after being injured in a motor vehicle  
16 accident in which his father, the driver, died. Tr. 389. His  
17 injuries from the accident were bilateral hemopneumothorax,  
18 multiple bilateral rib fractures, bilateral pulmonary contusions,  
19 a grade 2 splenic injury, right adrenal hematoma, and abrasions.  
20 Id. In addition, he was diagnosed with adult onset diabetes. Id.  
21 His past medical history was noted to be significant for Crohn's  
22 disease and mild asthma. Tr. 423. Mr. Hampton reported that he  
23 smoked cigarettes and occasionally drank alcohol. Id. According to  
24 Mr. Hampton's family, he was unemployed, but was a caregiver for  
25 his father. Id. After placement of chest tubes, an x-ray showed  
26 complete resolution of the bilateral pneumothoraces. Tr. 424. X-

1 rays of the pelvis and CT scans of the head and cervical spine were  
2 unremarkable, with no evidence of injury, fracture or dislocation.  
3 Id.

4       Upon discharge, he was advised to follow up with his primary  
5 care physician on the diabetes and to check his blood sugars, but  
6 was not started on insulin. Tr. 390. He was not restarted on Imuran  
7 for his Crohn's disease, but advised to discuss this with Dr.  
8 Brandt. Id. He was also given home oxygen therapy and advised to  
9 stay on an 1800 calorie diet. Id.

10       On May 26, 2006, Mr. Hampton saw Dr. Brandt for followup. Tr.  
11 462. Mr. Hampton reported grief issues surrounding the death of his  
12 father. Id. He also complained of swelling in his left calf, and  
13 Dr. Brandt ordered an ultrasound because he was at risk for deep  
14 venous thrombosis (DVT). Id. The ultrasound was negative. Id.

15       On June 26, 2006, Mr. Hampton saw Dr. Brandt. Tr. 461. Dr.  
16 Brandt wrote that he was "actually feeling much better, coping  
17 emotionally with the death of his father reasonably well." Id. He  
18 complained of persistent knee pain and swelling since the accident.  
19 Id. Otherwise, review of systems was benign. Id. He was compliant  
20 with his usual medications and "feeling better daily." Id. A recent  
21 evaluation for diabetes was negative. Id. On examination, there was  
22 some minimal evidence of effusion on the left knee, but with no  
23 warmth or erythema. Range of motion was intact. Id.

24       An x-ray of the left knee done on July 12, 2006, showed slight  
25 irregularity of the trabecular pattern of the left lateral tibial  
26 plateau, thought likely to be physiologic. Tr. 459.

1 On November 28, 2006, Mr. Hampton saw Scott Kitchel, M.D., for  
2 thoracic spine pain. Tr. 447. Mr. Hampton located the pain in the  
3 mid back and described it as a deep aching, burning, or pins and  
4 needles type of pain, made worse during and after exercise, and  
5 with standing or walking. Tr. 447. He reported some relief with  
6 lying down and with a TENS unit, but not from medication or  
7 physical therapy. Id. He denied significant arm or leg pain,  
8 numbness or weakness in the arms or legs, and incontinence. Id. Dr.  
9 Kitchel reviewed x-rays and found no evidence of acute or subacute  
10 compression fracture of the thoracic spine. Tr. 448. Dr. Kitchel  
11 ordered an MRI of the thoracic spine and advised Mr. Hampton to  
12 follow up after the MRI. Id.

13 An MRI of the thoracic spine on December 15, 2006, showed mild  
14 degenerative disc disease in the lower thoracic spine, without  
15 central canal or foraminal stenosis, and a depression in the  
16 superior end plate of the T8 vertebral body with mild anterior  
17 wedging. Tr. 444-45.

18 \_\_\_\_\_On February 14, 2007, Mr. Hampton saw Dr. Brandt, complaining  
19 of chest congestion, cough and malaise. Tr. 458. Dr. Brandt noted  
20 that Mr. Hampton continued to smoke. Id. Dr. Brandt diagnosed  
21 bronchitis, chronic tobaccoism and "some element of chronic  
22 obstructive pulmonary disease (COPD)." Id. Dr. Brandt prescribed  
23 inhalers and encouraged him to stop smoking. Id.

24 \_\_\_\_\_On March 6, 2007, Mr. Hampton returned to Dr. Kitchel. Tr.  
25 440. He reported that he "does occasionally get some thoracic  
26 pain." Id. Dr. Kitchel wrote that Mr. Hampton had been sent by his  
27

1 attorney to discuss possible permanent impairment, and that Dr.  
2 Kitchel had "rendered my opinion on that." Id.<sup>4</sup>

3 \_\_\_\_\_ On March 22, 2007, Mr. Hampton saw Dr. Brandt for complaints  
4 of back and flank pain on the left, at the site of his chest tube.  
5 Tr. 453. Dr. Brandt thought it likely that he would continue to  
6 have some pain related to the accident, and, at Mr. Hampton's  
7 request, provided him with a note. Id. Review of systems was benign  
8 except for cough, related to Mr. Hampton's continuing to smoke. Id.  
9 On physical examination, he had minimal tenderness to palpation  
10 along the left lateral chest wall around the area of the chest tube  
11 scar, but breath sounds were full, with no wheezing, rales or  
12 rhonchi. Id. There was some palpable spasm or tenderness in the  
13 parathoracic spinal musculature, but the spine was nontender and  
14 gait was unremarkable. Id. Dr. Brandt diagnosed chronic  
15 musculoskeletal pain related to the motor vehicle accident, "likely  
16 waxing and waning indefinitely into the future," but "of  
17 questionable significance." Id. Dr. Brandt's note states:

18       To Whom It May Concern: Robert has been under my care for  
19       some time. I have been asked to correspond on his behalf  
20       regarding the long term effects from his May 15, 2006  
21       motor vehicle accident. Robert will continue to have pain  
22       related problems well into the future that stem entirely  
23       from his accident and will likely impact his  
24       employability.

25 Tr. 479.

26       A chest x-ray taken March 22, 2007, revealed some new  
27       bilateral rib deformities with underlying pleural thickening,  
28       thought to be related to the accident, but no pleural effusion or

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<sup>4</sup> The record does not indicate what his opinion was.

1 pneumothorax. Tr. 457. Heart size was normal. Id.

2 \_\_\_\_\_ On March 30, 2007, Mr. Hampton's attorney wrote a letter to  
3 Dr. Brandt asking the following question:

4 I am trying to estimate the loss of earning capacity of  
5 Mr. Hampton due to the motor vehicle accident of May 15,  
6 2006. He has a work life ... expectancy of about 13 years  
7 according to the U.S. Department of Labor. Do you believe  
8 to a reasonable medical probability that it is likely  
9 that his motor vehicle injuries coupled with is [sic]  
10 previous medical conditions will make him unemployable  
11 during his expected remaining work life?

12 Dr. Brandt placed a check mark on a line marked "Yes." Tr. 478.

13 On March 29, 2007, Dr. Park saw Mr. Hampton for followup after  
14 his initial visit of February 2006. Tr. 450. Dr. Park wrote that  
15 Mr. Hampton had a colonoscopy on March 30, 2006, that showed  
16 "evidence of mild Crohn's colitis along with some mild internal  
17 hemorrhoids." Id. Dr. Park wrote that "[c]urrently, from the  
18 Crohn's perspective, the patient is doing well." Mr. Hampton was  
19 taking 200 mg. of Imuran daily and reported having one to two well  
20 formed bowel movements daily, with no rectal bleeding and no  
21 significant abdominal pain. Id.

### 22 **Hearing Testimony**

#### 23 First hearing

24 Mr. Hampton testified at the first hearing, on September 1,  
25 2005, that his Crohn's disease caused severe abdominal pain and  
26 rectal bleeding, tr. 321, as well as loose stools and frequent  
27 bowel movements, sometimes causing him to stay in the bathroom for  
28 as long as 20 minutes, and occurring four or five times a day. Tr.  
322-324. He described his depression as, "like all of a sudden I'll

1 start crying and worried about the future and just constantly  
2 stressed out over what's going to happen to me." Tr. 327. These  
3 symptoms occur about once a week, and go away if he thinks of  
4 something else or takes the Effexor prescribed for him. Id. He said  
5 he has problems remembering things and concentrating. Tr. 328. He  
6 gets very nervous about being around new people, and gets anxiety  
7 attacks about twice a day. Tr. 329-30. These attacks cause him to  
8 feel "sort of incapacitated in a way that I can't deal with  
9 people," as well as nauseated. Tr. 330. He is not receiving  
10 psychological counseling; he testified that "I thought about it,  
11 but I just never did." Tr. 332.

12 Mr. Hampton testified that "on average," the medications he is  
13 taking work for him, tr. 330, but that in the past, he stopped  
14 taking them when he was ill because he thought the medications  
15 undermined his immune system, until his doctor told him not to  
16 discontinue the medication. Tr. 331.

17 Mr. Hampton's mother, Christine Anderson, testified at the  
18 hearing, as did his niece, Jennifer Stump. Tr. 333, 336. Ms.  
19 Anderson testified that Mr. Hampton had to go to the bathroom very  
20 often. Id. She confirmed that he sometimes spent up to 20 minutes  
21 in the bathroom. Tr. 334. She said he got "real nervous and  
22 frustrated and can't seem to think straight," on a daily basis. Tr.  
23 336. Ms. Stump also said Mr. Hampton had to use the restroom "all  
24 the time." Tr. 337.

25 The ALJ called a vocational expert (VE), Patricia Lesh. Tr.  
26 338. The ALJ asked her to consider an individual with a high school  
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1 education and no relevant work history, unable to work in a place  
2 without access to a bathroom facility. Tr. 339. The VE testified  
3 that such a person could work as a sedentary assembler and  
4 housekeeper/cleaner. Tr. 340. The ALJ then provided a second  
5 hypothetical, with the additional limitations of being unable to  
6 work with the public or work intensively with coworkers, and  
7 limited to following simple instructions. Tr. 340-41. The VE  
8 responded that the jobs she identified could be performed with the  
9 additional limitations. Tr. 341. Asked by Mr. Hampton's attorney  
10 whether an individual would be precluded from those jobs if he were  
11 required to be in the bathroom for 20 minutes at a time, five or  
12 six times a day, she responded that he would not be able to perform  
13 any job. Id.

14 Second hearing

15 On November 20, 2007, at the second hearing, Mr. Hampton  
16 testified that since the previous hearing, he had sustained the  
17 injuries in the May 15, 2006 car accident, which had resulted in  
18 back pain, an inability to lift, and an inability to sit or stand  
19 for extended periods of time. Tr. 484. He said he has to lie down  
20 frequently. Id. Mr. Hampton said his depression had grown worse, as  
21 a consequence of his father's death in the car accident, tr. 485,  
22 and said he also seemed to forget things and didn't concentrate as  
23 easily. Id. Since the accident he has used his asthma inhaler every  
24 day. Id. He feels panicky when he has difficulty breathing. Tr.  
25 486. Mr. Hampton testified that he was able to stand about 20  
26 minutes before he felt numbness, tingling and pain in his back. Tr.

1 487. Lifting anything heavier than a load of laundry causes pain in  
2 his back. Tr. 488. He can sit for about 30 minutes before having to  
3 change to a standing position. Tr. 492. He is able to walk less  
4 than half an hour before he experiences shortness of breath. Tr.  
5 495. He gets no exercise. Id. The pain in his back is on the right  
6 side, from shoulder to waist, in a section about six inches wide.  
7 Tr. 491. He uses a TENS unit. Id.

8 \_\_\_\_\_ Asked about whether he had obtained any treatment for  
9 depression, Mr. Hampton responded that he had "taken medication for  
10 it and it seemed to help, but then I just didn't continue it." Tr.  
11 499.

12 A VE, Mark McGowan, testified at the hearing. Tr. 501. The ALJ  
13 asked the VE to consider an individual 49 years old, with a high  
14 school education and no relevant work experience, unable to work in  
15 a place without access to bathroom facilities. The VE identified  
16 jobs as a laundry worker, photo copy machine operator, and  
17 assembler semi-conductor. Tr. 502. The ALJ then offered a second  
18 hypothetical, with additional limitations including carrying no  
19 more than 10 pounds frequently, with an occasional 20-pound  
20 maximum, an opportunity to change position, standing or walking no  
21 more than 20-30 minutes at a time, and no exposure to excessive  
22 dust or fumes. Tr. 502-03. The VE testified that such an individual  
23 could not perform the laundry worker or photocopy machine operator  
24 positions, but could still perform the assembler position, as well  
25 as some positions as an assembler of small products. Tr. 503-04.  
26 When the ALJ added an additional limitation of being unable to work  
27



1 with the public or work intensively with coworkers, and being  
2 limited to following simple instructions, the VE testified that the  
3 two assembler jobs could still be performed. Tr. 505.

#### 4 **ALJ's Decision**

5 In his second decision, on February 15, 2008, the ALJ found  
6 that Mr. Hampton's colitis/inflammatory bowel disease/Crohn's  
7 disease was a severe impairment. Tr. 200. The ALJ noted that Mr.  
8 Hampton had testified that he had COPD or asthma as an impairment,  
9 but that the February 2005 chest x-ray was normal. The ALJ  
10 concluded that in the absence of medical opinions suggesting any  
11 restrictions stemming from this impairment, it was not severe. Id.  
12 With respect to Mr. Hampton's testimony of thoracic spine pain, the  
13 ALJ found that x-rays showed no evidence of acute or subacute  
14 compression fracture from the accident, and that by the time of a  
15 chart note from Dr. Kitchel in March 2007, Mr. Hampton reported  
16 only occasional thoracic pain. Id. The ALJ concluded that any  
17 residual effects of the thoracic compression and degenerative  
18 disease had not been shown to cause vocational restrictions.

19 On Mr. Hampton's claimed impairment of depression, the ALJ  
20 acknowledged that Dr. Brandt had noted fatigue with "significant  
21 depressive symptoms" in May 2005, and that Dr. Markowitz mentioned  
22 a complaint of depression in September 2005. Tr. 201. However, the  
23 ALJ found that the medical record "did not declare symptoms  
24 associated with the claimant's depression: although Mr. Hampton's  
25 doctors reported what he told them, none of them mentioned clinical  
26 findings or observations, and later records did not even include

1 depression as a diagnosis. Id. The ALJ concluded, "Every indication  
2 is that it was transitory and controllable with medication." Id.  
3 The ALJ also cited to the opinion of Dr. Anderson in May 2006,  
4 based on a records review, that Mr. Hampton did not have a severe  
5 impairment, and had no limitations in activities of daily living,  
6 social functioning, concentration, persistence or pace, or episodes  
7 of decompensation. Tr. 201-02.

8 The ALJ found that Mr. Hampton's testimony about the duration,  
9 frequency, and intensity of his symptoms was not fully credible.  
10 Tr. 203. The ALJ noted Dr. Markowitz's statements in June 2002 and  
11 again in February 2004 that Mr. Hampton's Crohn's disease was under  
12 good control on Imuran. Tr. 204. Six months later, Dr. Markowitz  
13 wrote that Mr. Hampton was "doing pretty well from an inflammatory  
14 bowel standpoint," with no GI symptoms and normal lab results. Id.  
15 The ALJ noted that the characterization of Mr. Hampton's bowel  
16 disease as mild, or observations that he was doing well, continued  
17 in the record through 2006. Id. Further, the ALJ found Mr.  
18 Hampton's ability to gain weight was inconsistent with the alleged  
19 effects of the impairment, noting evidence that Mr. Hampton's  
20 weight had gone from 203 in 2001 to 212 in 2002 and 220 in 2003.  
21 Id. The ALJ found that the evidence suggested "some disinterest by  
22 the claimant in doing all he can to control his alleged symptoms,"  
23 noting that Mr. Hampton continued to smoke while complaining of  
24 coughs and upper respiratory infections, and despite much medical  
25 advice to stop smoking because it exacerbated his Crohn's disease.  
26 Id. The ALJ also noted Mr. Hampton's frequent failures to follow up

1 with examinations for his gastrointestinal problems and the  
2 laboratory studies required for Imuran, and lack of compliance with  
3 taking medications. The ALJ concluded, "The overall record points  
4 to a relatively mild condition that can be controlled adequately  
5 with appropriate medications." Id.

6 \_\_\_\_\_The ALJ found Mr. Hampton's credibility weakened by his work  
7 history, which suggested "disinterest or lack of success in  
8 employment." Tr. 205. The ALJ wrote that despite Mr. Hampton's  
9 completion of training in the field of electronics in 1987, he  
10 posted earnings of more than \$15,000 in only two subsequent years;  
11 other than minimal posted earnings in 1989 and 1990, "the claimant  
12 was unemployed for 10 years prior to his alleged disability onset  
13 date of November 1, 2000." Id.

14 The ALJ acknowledged that Dr. Markowitz had written a one-  
15 sentence opinion stating that Mr. Hampton was disabled by  
16 inflammatory bowel disease, but found that the statement provided  
17 no evidence in support of the opinion, and was inconsistent with  
18 Dr. Markowitz's office notes showing good control with medication  
19 but noncompliance. Id. The ALJ also considered Dr. Brandt's check  
20 mark next to "yes" in response to a three sentence form submitted  
21 by Mr. Hampton's lawyer. The ALJ gave this opinion no weight  
22 because the document did not reference specific medical conditions  
23 and Dr. Brandt did not list any objective medical findings to  
24 support his conclusion that Mr. Hampton was unable to work for the  
25 rest of his life. Id. Similarly, the ALJ found Dr. Brandt's "To  
26 Whom It May Concern" letter in March 2007 not worthy of much weight  
27

1 because Dr. Brandt did not explain how the "pain related problems"  
2 would affect Mr. Hampton's employment and contained no medical  
3 findings in support of his opinion. Tr. 206. Further, the ALJ found  
4 the opinion of questionable validity in light of a contemporaneous  
5 office note characterizing Mr. Hampton's musculoskeletal pain as  
6 being of "questionable significance." Id.

7 The ALJ found that Mr. Hampton had the residual functional  
8 capacity to perform any level of exertional activity so long as he  
9 had access to a nearby bathroom. Tr. 202. Based on the VE's  
10 testimony, the ALJ concluded that Mr. Hampton had the ability to do  
11 work that exists in significant numbers in the national economy,  
12 and found him not disabled. Tr. 208.

### 13 **Standard**

14 The court must affirm the Commissioner's decision if it is  
15 based on proper legal standards and the findings are supported by  
16 substantial evidence in the record. Meanel v. Apfel, 172 F.3d 1111,  
17 1113 (9<sup>th</sup> Cir. 1999). Substantial evidence is such relevant evidence  
18 as a reasonable mind might accept as adequate to support a  
19 conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971);  
20 Andrews v. Shalala, 53 F.3d 1035, 1039 (9<sup>th</sup> Cir. 1995). In  
21 determining whether the Commissioner's findings are supported by  
22 substantial evidence, the court must review the administrative  
23 record as a whole, weighing both the evidence that supports and the  
24 evidence that detracts from the Commissioner's conclusion. Reddick  
25 v. Chater, 157 F.3d 715, 720 (9<sup>th</sup> Cir. 1998). However, the  
26 Commissioner's decision must be upheld even if "the evidence is

1 susceptible to more than one rational interpretation." Andrews, 53  
2 F.3d at 1039-40.

3 The initial burden of proving disability rests on the  
4 claimant. Meanel, 172 F.3d at 1113; Johnson v. Shalala, 60 F.3d  
5 1428, 1432 (9<sup>th</sup> Cir. 1995). To meet this burden, the claimant must  
6 demonstrate an "inability to engage in any substantial gainful  
7 activity by reason of any medically determinable physical or mental  
8 impairment which ... has lasted or can be expected to last for a  
9 continuous period of not less than 12 months[.]" 42 U.S.C. §  
10 423(d) (1) (A) .

11 A physical or mental impairment is "an impairment that results  
12 from anatomical, physiological, or psychological abnormalities  
13 which are demonstrable by medically acceptable clinical and  
14 laboratory diagnostic techniques." 42 U.S.C. § 423(d) (3). This  
15 means an impairment must be medically determinable before it is  
16 considered disabling.

17 The Commissioner has established a five-step sequential  
18 process for determining whether a person is disabled. Bowen v.  
19 Yuckert, 482 U.S. 137, 140 (1987); 20 C.F.R. §§ 404.1520, 416.920.

20 In step one, the Commissioner determines whether the claimant  
21 has engaged in any substantial gainful activity. 20 C.F.R. §§  
22 404.1520(b), 416.920(b). If not, the Commissioner goes to step two,  
23 to determine whether the claimant has a "medically severe  
24 impairment or combination of impairments." Yuckert, 482 U.S. at  
25 140-41; 20 C.F.R. §§ 404.1520(c), 416.920(c). That determination is  
26 governed by the "severity regulation," which provides:

1 If you do not have any impairment or combination of  
2 impairments which significantly limits your physical or  
3 mental ability to do basic work activities, we will find  
4 that you do not have a severe impairment and are,  
5 therefore, not disabled. We will not consider your age,  
6 education, and work experience.

7 §§ 404.1520(c), 416.920(c). If the claimant does not have a severe  
8 impairment or combination of impairments, the disability claim is  
9 denied. If the impairment is severe, the evaluation proceeds to the  
10 third step. Yuckert, 482 U.S. at 141.

11 In step three, the Commissioner determines whether the  
12 impairment meets or equals "one of a number of listed impairments  
13 that the [Commissioner] acknowledges are so severe as to preclude  
14 substantial gainful activity." Yuckert, 482 U.S. at 140-41. If a  
15 claimant's impairment meets or equals one of the listed  
16 impairments, he is considered disabled without consideration of her  
17 age, education or work experience. 20 C.F.R. s 404.1520(d),  
18 416.920(d).

19 If the impairment is considered severe, but does not meet or  
20 equal a listed impairment, the Commissioner considers, at step  
21 four, whether the claimant can still perform "past relevant work."  
22 20 C.F.R. §§ 404.1520(e), 416.920(e). If the claimant can do so, he  
23 is not considered disabled. Yuckert, 482 U.S. at 141-42. If the  
24 claimant shows an inability to perform his past work, the burden  
25 shifts to the Commissioner to show, in step five, that the claimant  
26 has the residual functional capacity to do other work in  
27 consideration of the claimant's age, education and past work  
28 experience. Yuckert, 482 U.S. at 141-42; 20 C.F.R. §§ 404.1520(f),  
416.920(f).

## Discussion

1. Failure to develop the record regarding possible mental impairment

Mr. Hampton asserts that the ALJ failed to follow the mandate of the district court to develop the record on this impairment, because the ALJ reached his decision that Mr. Hampton did not have severe mental impairments solely on the basis of reviewing psychologist Dr. Anderson's assessment. He argues that in her records review, Dr. Anderson considered only fatigue and loss of interest in activities, while Mr. Hampton testified at the hearing to other symptoms, including anxiety, depression, panic attacks, crying spells, difficulty with memory and concentration, and difficulties around people or in new situations. Mr. Hampton points out that his mother corroborated some of this testimony, but that the ALJ nevertheless failed to have him examined or obtain medical advice about the significance of Mr. Hampton's symptoms.

The ALJ has a duty to fully and fairly develop the record and to assure that the claimant's interests are considered, even when claimant is represented by counsel. Smolen v. Chater, 80 F.3d 1273 (9<sup>th</sup> Cir. 1996). However, the ALJ's duty to develop the record is triggered "only when there is ambiguous evidence or when the record is inadequate to allow for proper evaluation of the evidence." Mayes v. Massanari, 262 F.3d 963, 968 (9<sup>th</sup> Cir. 2001), *as amended*, 276 F.3d 453 (9<sup>th</sup> Cir. 2002). The duty does not extend to a silent record that does not support disability. Armstrong v. Commissioner, 160 F.3d 587, 589 (9<sup>th</sup> Cir. 1998). Thus, while the ALJ is not a

1 "mere umpire," Higbee v. Sullivan, 975 F.2d 558, 561 (9<sup>th</sup> Cir.  
2 1991), the burden of establishing an impairment remains at all  
3 times upon the claimant. Yuckert, 482 U.S. at 146; Bayliss v.  
4 Barnhart, 427 F.3d 1211, 1217 (9<sup>th</sup> Cir. 2005). No authority suggests  
5 that the regulations require the ALJ to continue developing the  
6 record until disability is established; the regulations require  
7 only that the ALJ assist the claimant in developing a complete  
8 record. Yuckert, 482 U.S. at 146.

9 The existence of mental symptoms other than those considered  
10 by Dr. Anderson--anxiety, depression, panic attacks, crying spells,  
11 difficulty with memory and concentration, and difficulties around  
12 people or in new situations-- is supported only by the testimony of  
13 Mr. Hampton. The ALJ found his testimony not fully credible, and  
14 Mr. Hampton does not challenge that finding. I also find no error  
15 in the ALJ's conclusion that Mr. Hampton's mental symptoms were  
16 fleeting and controlled with medication. Mr. Hampton testified at  
17 that he had "thought about" but never sought mental health therapy,  
18 and that although medication had helped, he had stopped taking it.  
19 This testimony is consistent with the ALJ's finding. Absent any  
20 evidence other than Mr. Hampton's somewhat discredited testimony to  
21 support the existence of a severe mental impairment, I conclude  
22 that the ALJ had no duty to assume Mr. Hampton's burden of proof by  
23 developing further evidence to support Mr. Hampton's claimed mental  
24 impairments.

25 2. Failure to give further consideration to RFC in light of  
26 evidence of frequent need for bathroom access

27 Mr. Hampton also assigns error to the ALJ's decision because,



1 although the ALJ included in his hypothetical to the VE a claimant  
2 who was limited to work environments that allowed restroom access,  
3 the ALJ disregarded the testimony of Mr. Hampton and his mother  
4 about his need to spend substantial amounts of time in the bathroom  
5 in formulating the hypothetical. Mr. Hampton argues in his brief  
6 that the ALJ disregarded testimony from himself that he was in the  
7 bathroom for 20 minute periods that occurred four to five times per  
8 day, and his mother's testimony that he "sometimes" spent up to 20  
9 minutes at a time in the bathroom.

10 As noted above, the ALJ did not find Mr. Hampton's testimony  
11 fully credible, and Mr. Hampton has not challenged that finding.  
12 Credibility determinations bear on evaluations of medical evidence  
13 when an ALJ is presented with inconsistency between a claimant's  
14 subjective complaints and his diagnosed conditions. Webb v.  
15 Barnhart, 433 F.3d 683, 688 (9<sup>th</sup> Cir. 2005). The ALJ's conclusion  
16 that Mr. Hampton's testimony was not entirely credible must  
17 therefore be taken into account when evaluating his residual  
18 functional capacity.

19 The record does not support Mr. Hampton's argument that the  
20 ALJ's hypothetical to the VE should have included the necessity of  
21 being in the bathroom 20 minutes at a time four to five times per  
22 day. The ALJ noted the inconsistency between Mr. Hampton's  
23 testimony and Dr. Markowitz and Dr. Park's consistent  
24 characterization of Mr. Hampton's bowel disease, from 2004 to 2006,  
25 as mild, being under good control on Imuran, and not manifesting GI  
26 symptoms. The ALJ also noted the inconsistency between Mr.

1 Hampton's testimony of spending 20 minutes at a time in the  
2 bathroom several times a day and his steady weight gain, his  
3 continuing to smoke despite being advised that it would exacerbate  
4 his Crohn's disease, and his noncompliance with taking medications  
5 as prescribed. See, e.g., Bunnell v. Sullivan, 947 F.2d 341, 346  
6 (9<sup>th</sup> Cir. 1991) (en banc) (unexplained, or inadequately explained,  
7 failure to follow a prescribed course of treatment is a relevant  
8 factor in assessing credibility). I find no error, therefore, in  
9 the ALJ's conclusion that Mr. Hampton's bowel disease was  
10 relatively mild and under adequate control with medication, and not  
11 including Mr. Hampton's testimony about the duration of his  
12 bathroom breaks in the hypothetical to the VE.

### 13 **Conclusion**

14 I recommend that the Commissioner's decision be affirmed.

### 15 **Scheduling Order**

16 The above Findings and Recommendation will be referred to a  
17 United States District Judge for review. Objections, if any, are  
18 due July 21, 2009. If no objections are filed, review of the  
19 Findings and Recommendation will go under advisement on that date.  
20 If objections are filed, a response to the objections is due August  
21 4, 2009, and the review of the Findings and Recommendation will go  
22 under advisement on that date.

23 Dated this 2<sup>nd</sup> day of July, 2009.

24  
25 /s/ Dennis James Hubel

26 Dennis James Hubel  
27 United States Magistrate Judge

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